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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. \_\_\_\_\_

CHARLES L. DANIEL, et al.,  
*Petitioners,*

vs.

RUSH PETTWAY, et al.,  
*Respondents,*

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
*Respondent,*

AMERICAN CAST IRON PIPE COMPANY  
*Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1. Did the court below err in failing to enforce the mandate of *Pettway v. American Cast Iron Pipe Company*, 576 F.2d. 1157 (5th Cir. 1978), *cer. denied*, 439 U.S. 1115 (1979) and *Pettway v. American Cast Iron Pipe Company*, 494 F.2d. 211 (5th Cir. 1974) and in sanctioning a consent settlement approved by the district court which contained no "opt out" provisions as mandated in the cases enumerated above?

2. Should the supervisory power of the court below have been invoked to enforce the "opt out" procedures outlined by the Fifth Circuit to assure class members due process of law?

3. Did the District Court err in advising the objectors to the proposed consent decree to consult with Attorney Wiggins, the class attorney on objections to the proposed decree and his conduct in consulting with the attorney for the defendant on how to meet these objections and did this action constitute a sell-out, compromise or collusion to such an extent the court should have provided separate counsel and created a sub-class for the protection of this definable minority?

4. Were the petitioners denied even minimum due process of law by the District Court's failure to insist that the proponents of the settlement offer any proper witnesses and any testimony, especially expert testimony, as to the economic factors considered in finding the settlement to be fair, just, and reasonable thereby denying the objectors any right to confront witnesses or to conduct cross-examination, with the result being that the burden of proving the settlement to be unfair, unjust and unreasonable being improperly shifted to the objectors, also in violation of due process of law?

5. Did the District Court deny the objecting class members due process of law by improperly shifting the burden of proof to the objecting class members and improperly considering as evidence economic facts proffered by the class attorney denying a right of cross-examination to petitioners?

# LIST OF PARTIES

The parties in the court below were Charles L. Daniel, et al.<sup>1</sup>, Rush Pettway, et al.<sup>2</sup>, Equal Employment Opportunity<sup>3</sup>, and American Cast Iron Pipe Company<sup>4</sup>.

<sup>1</sup>Charles L. Daniels; Lewis Spratt, Sr.; Henry Goodgame; Henry Arnold, Jr.; James Barnes; Elijah Brown; Willie Brundidge; Mose Bunch; Robert Caldwell; William Caldwell; Robert Cannon; Melvin Carson; Rosie Catlin; Willie Curry; Ed Dancy, Jr.; Carl Edwards; Leon Elliott; Randolph Ellis; Fitchue Anderson; Willie Harper; Hattie Hopkins; Nathaniel Howard; Eddie Huggins; Johnnie Hughes; Fred Jemison; Rufus Johnson; Laura Kimbrough; Hubert Moore; Henry O'Neal; Theodore Peoples; Willie Perdue; William Pollard; Booker T. Powell; David Powers; Earnest Rich; Lemmie Ruffin; William Spencer; Estelle Allen; Joe Steel, Jr.; Zonnie Stuckey; Andrew Thomas; Melvin Turner; Eugene Williams; Raymond Williams Jerry Zorns; Erwin Callens, Sr.; Willie Blue; Henry Rice; S. W. King, Jr.; Earl Murray; Jim Amison, Jr.; Peter J. Wrenn\*; Benjamin Shorter; Melvin Brown; Melvin C. Story; M. L. Walls; Calvin C. Johnson; John Jenkins; Thomas M. Phillips; Bruce Square. . . . . Plaintiff-Appellants

\*Named plaintiff in 1966.

<sup>2</sup>Rush Pettway, David Jordan, Alex Fitts, and the class of black employees of the American Cast Iron Pipe Company . . . . . Respondents.

<sup>3</sup>American Cast Iron Pipe Company . . . . . Respondent.

<sup>4</sup>Equal Employment Opportunity Commission . . . . . Intervenor.

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**PETITION FOR WRIT OF CERTIORARI TO THE  
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TO THE HONORABLE, CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Charles L. Daniel, et al., respectfully pray that a writ of certiorari be issued out of and under the seal of this court to review the judgment of the United States Court of Appeals for the Eleventh Circuit rendered on the 21st day of November, 1983, which judgment affirmed the District Court Decision that the Respondent's consent settlement was fair, reasonable and adequate.

The timely application for rehearing in the United States Court of Appeals for the Eleventh Circuit was denied without an opinion on the 29th day of January, 1984.

### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit has been reported at 721 F.2d 315, and is attached hereto in Appendix A, *infra*, pp. A-36 - A-39.

The previous opinion of the Trial Court, the United States District Court of the Northern District of Alabama, Judge Seybourn H. Lynne has not been officially reported but is attached hereto in Appendix A, *infra*, pp. A-3 - A-35.

### JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on the 21st day of November, 1983, and is annexed hereto in Appendix A, *infra*, pp. A-1 - A-2.

A timely petition for rehearing was denied on the ~~29~~<sup>30</sup>th day of January, 1984, and the judgment of the United States Court of Appeals for the Eleventh Circuit thereon is attached hereto in Appendix A, *infra*, pp. A-40.

The statutory provision believed to confer jurisdiction upon this Court to review the judgment of the United States Court of Appeals of the Eleventh Circuit rendered the ~~29~~<sup>30</sup>th Day of January, 1984, is 28 U.S.C. 1254 (1). 30

### CONSTITUTIONAL PROVISION INVOLVED

The fifth amendment to the United States Constitution provides in pertinent part:

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### STATUTE INVOLVED

The statutory provision involved in this proceeding is 42 U.S.C. § 2000e-5(g) which provides as follows:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful

employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

### **Rule 23. Class Actions**

**(a) Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

**(b) Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

**(c) Determination by Order Whether Class Actions to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.**

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this

subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

**(d) Orders in Conduct of Actions.** In the conduct of actions to which this rule applies, the court may make appropriate orders:

(1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action or of the proposed extent of the judgment, or of the

opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

**(e) Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

## STATEMENT OF THE CASE

This is the sixth appeal of this case before the Eleventh Circuit and its predecessor, the Court of Appeals for the Fifth Circuit. The history of the litigation is fully stated in its last previous appearance, *Pettway, et al. v. American Cast Iron Pipe Co.*, 681 F.2d 1259 (11th Cir. 1982). Originally the trial court found the existence of racial discrimination in the employment and promotion practices of the defendant. The court granted an injunction and then declined to find any damages in favor of the plaintiff class. Upon appeal, the Fifth Circuit Court of Appeals remanded for a determination of back pay, 494 F.2d 211, leaving open, of course, the possibility of a settlement between the parties. Such a proposed settlement was recommended by the class representatives and their counsel, in a sum amounting to approximately \$1,000,000.

There were objections and an appeal to the Fifth Circuit Court of Appeals who disapproved the consent settlement and stated

we further hold that on remand the district court must provide those claimants who decide to opt-out of the settlement with an opportunity to assert their individual claims in this action. *Pettway IV*, 576 F.2d at 1220. Such claimants must be permitted to exclude themselves from the class and must be given an opportunity to prove entitlement to a larger individual award in the same court that hears the claims of the class. 706 F.2d 1220 (1978)

A substantial number of the members of the class had accepted checks mailed out by the defendant in accordance with the proposed settlement. The court in *Pettway IV* further opined:

Of course, each of the 399 awardees who opted into the settlement should be provided notice of their right to disaffirm their award and participate in further back pay proceedings. This notice should fully explain the awardee's rights and the proper procedures for exercising them.

After *Pettway IV* the district court and parties proceeded to settle the injunctive aspect of the action and in attempting to

settle the back pay aspect ordered in 1971 were unable to agree. The defendant desired to make an offer of judgment to members of the class, and the court appointed a special master where the individual had to establish his entitlement. The class appealed and the Eleventh Circuit in *Pettway v. American Cast Iron Pipe Company*, 681 Fed.2d 1259 (1982) (certiorari pending) reversed the district court and ordered settlement on a classwide basis.

On remand the parties shortly thereafter arrived at a tentative settlement and began meeting and notifying the class of the proposed classwide settlement for \$3,983,401.91 in satisfaction of all racial discrimination. The consent settlement and notice did not provide an "opt out" provision as mandated in *Pettway IV supra* nor had the court and parties provided the 399 a right to disaffirm their award and participate in further back pay proceedings (these were meted out \$500 each without regard to the amount of discrimination.)

The objectors appealed the district court's finding that the consent decree was fair, adequate and reasonable. The Eleventh Circuit addressed none of the issues presented but after a history of the case summed up appellant's argument as follows, "they did not receive amounts in the proposed distribution equal to comparable members of the class." The parties in their notice to members of the class advised any person who might object as follows:

The attorney representing the class is available to assist you . . . He will also assist any member of those who objects to the settlement by providing advice on the proper procedure to follow in presenting such objections.

The 110 objectors filed their objections but contrary to the intent of the notice, Robert L. Wiggins, Jr., attorney for the class according to his accounting to the court (R. 146) was meeting with Acipco's attorney, Pat Logan, to "sell out" those who objected. On April 22, 1983, the class attorney "reviewed the status of objection at the courthouse; talked to Logan, April 26, 1983. Review objections and draft joint motion to require disclosure of facts by objectors, draft letter to Logan summarizing objections by categories—5 page letters to April 27,

1983 . . . *prepare and meet with Pat Logan on approach to objections.*" (emphasis supplied) (R. 146)

The objectors had requested the court to allow separate counsel, but the court had taken no action on the several requests and advised the objectors that it would award no fees to the attorney for objectors. The constitutional guarantee of due process of representation had not only been breached but their counsel, contrary to ethics, as well as our adversary system was plotting with the defendant against their interest. The court may not have been aware of this at the time of its occurrence. Attorney Wiggins filed his supplemental affidavit with the court showing the misconduct on June 23, 1983, on the same day the court issued and approved his finding of facts and his actions against members of the class in conjunction with their adversary were set forth in his affidavit was commended and he was compensated an additional \$50,000.00.

Your petitioners would be remiss in not taking issue with the court's finding of fact and conclusion of law. The district court judge included many facts which were not of record at the fairness hearing nor the subject of any judicial scrutiny i.e. meetings held at church, votes of the individual members at meetings and conclusions drawn therefrom. On one occasion in the appendix he notes that an objector was either absent or not listening at one of the class meetings several weeks earlier. The court was also privy to many of the meetings with the class attorney and the class at the attorney's office or, at least, his facts indicate as much. The court also in its conclusion takes liberties statistically to minimize the petition of those filing objections. The class initially contained some twenty-two hundred (2,200) and had been reduced to eight hundred and thirty three (833) who would participate in back pay award. The court finding of fact that less than *five per cent* objected when in the record page 4, the court noted "some hundred ten (110) objections have been received." The court also, contrary to presumptions under the law, assumed that all who did not object were in accord and agreement with the whole settlement.

The court fails to note negative factors in its finding i.e. that the E.E.O.C. failed to sign the agreement nor signifying accord as to

its adequacy or fairness. The court also fails to note that no member of the class or class representative testified in favor of the proposed consent settlement. Joe Marbury, a representative of the class Committee for Equal Job Opportunity testified in opposition to the settlement, the way it was negotiated and presented to the class and the manner in which awards were granted i.e. one man was given ten thousand dollars (\$10,000) for praying. There were ten witnesses who testified and the court after an initial statement in opening recessed until 1:30 and adjourned at 4:25 p.m. Although the court in its record of fact implies that objectors were provided ample time stated that he wanted the matter brought to a close and advising "you've got ten more minutes". (F.H. 95)

The purported computer print outs on which the court relies to substantiate the heresay affidavits which were never received were examined by your writer and the material contains no conclusions nor calculations only parties' names, race and job class. Mr. Wiggins advised your writer that there had been no written opinion arrived at and recieved by the "expert" who was to receive \$175,000. The court was advised that the computer printouts had not been furnished as requested and the expert proffered by the objectors was brushed aside by the court.

The class representatives were not representative of all the class members. The Committee for Equal Job Opportunity (C.E.J.E.) removed all (being part of the 399) who cashed their checks in 1975 from the committee although they were some of the original members of the committee when it numbered less than ten.

The Equal Employment Opportunity Commission (E.E.O.C.) was a party to the action having appealed to the Eleventh Circuit in 1982 to reverse the trial court for deleting them from the case. *Pettway v. American Cast Iron Pipe Company*, 681 F.2d 1269 (11th Cir. 1982). The E.E.O.C. was not a party to the consent settlement nor a signator but after an appeal noted that the settlement appeared on its face to be fair. This was noted by the Eleventh Circuit in its opinion at page 316.

In the fairness hearing the defendant offered no evidence only

affidavits which were objected to by petitioner as to the proposed settlement being fair, reasonable and adequate. No ruling was made as to the reception of this offer by the trial judge and this was included in the record on appeal by supplementing the record.

The parties gave notice to the class of its proposed settlement and attached form objection to be filed by persons having objection. Objectors were advised to see the class attorney Wiggins since 110 objections were filed. Prior to the fairness hearing while he was obliged by notice to meet with the objectors Attorney Wiggins was meeting and conferring with the attorney for the defendant Pat Logan on "approach to objection." As early as February 24, 1983, the class attorney noted "dissention in class and distribution formula." The court noted the possible conflicts within the class but took no steps to create a subclass or enter an order allowing the objectors to "opt out" of the proposed settlement.

The Court of Appeals had mandated that the court provide an "opt out" right to persons who might disagree with any future settlements and also that as to the persons who cashed their checks in 1975. The court ordered established a procedure whereby they might repay the money or place security for monies received in the 1975 settlement offer thus allowing them to "opt in" the class. No procedure was established by the court although the defendant had made a motion for repayment of the money or posting pursuant to the mandate. These provisions were inferentially approved by the Supreme Court in its denial of certiorari.

The court on May 12, 1983, issued its final judgment that the consent decree was fair, reasonable and adequate. A Motion for Rehearing was filed on May 23, 1983 and the court at the time of rendering its finding of fact and conclusion of law on June 23, 1983, overruled the Motion for Rehearing. Notice of appeal was filed by the objectors, Charles L. Daniel and Estelle Allen on July 22, 1983 and the cases were consolidated on appeal. The objectors appealed to the Eleventh Circuit and on November 21, 1983, the Eleventh Circuit Court of Appeals in its opinion at 721 F.2d 315 (11th Cir. 1983) upheld the trial court's ruling and found the consent settlement was "fair and reasonable." The appellants moved for an en banc rehearing which was denied on January 28, 1984 (Appendix, pp. A-40), and appellants petition at this time for certiorari to the Supreme Court of the United States.

## REASONS FOR GRANTING THE WRIT

### ISSUE I

*Whether the district courts approval of the consent settlement notice and the conduct of the class representative, class counsel and court so abridged the objector's rights of due process and to render the same collusive and cause the "fairness hearing" to amount to "boiler plate" approval of an inadequate award and a "sell out" of a large definable minority, departing to such an extent that the supervisory powers of this court be invoked by certiorari to define the accepted and usual course of judicial proceeding.*

The fairness hearing conducted and noticed by the district court provided no "opt out" procedure for the class objectors which the court in *Pettway v. American Cast Iron Pipe Company* (Pettway IV) referred to as "subclass members" noting the class was divided. The total receiving awards were less than 800, the number noted in Pettway IV was 399. The notice itself advised any objector he would be subject to cross-examination on the fairness hearing. The class objectors were advised to see Mr. Wiggins, the class attorney. After objections had been filed this same attorney Wiggins met and talked with defendant ACIPCO's counsel Logan summarizing the objector and ultimately "meet with Pat Logan on approach to objection. 10.9 hours." (pp. A-42)

At the hearing the court allowed the class representative and defendant to offer affidavit of economic data to substantiate that the proposed settlement was fair, reasonable and adequate. The class attorney filed his own affidavit as to the settlement being fair, reasonable and adequate although the proposed settlement approved a fee of \$175,000 to the expert. There have been several attempts to arrive at consent settlements and how to treat the competing of the members of the case.

"Although settlement is the preferred method of resolving Title VII suits, the class action settlement process is "more susceptible than adversarial adjudications to certain types of abuse." *Pettway vs. American Cast Iron Pipe Co.*, 576 Fed. 2nd 1157, 1169 (5th Cir. 1978) (Pettway IV). Federal Rule of Civil

Procedure 23(c) mandates judicial approval of all class action settlements and that requirement is manifested in both substantive and procedural protections afforded to absent class members . . ." the law accords special protections, primarily procedural in nature to *individuals* class members whose interests may be compromised in the settlement process "Pettway IV 576 Fed. 2d 1326, 1330 (5th Cir. 1977). The fact that appellant objectors were denied both procedural and thereby substantive protection previously guaranteed by the Court of Appeals is the basis for this writ of certiorari.

*Holmes vs. Continental Can* reaffirms that appellate courts: "must have a basis for judging the exercise of the district judge's discretion." *Cotton vs. Hinton*, supra., the proponents of class action settlements bear the burden of developing a *record* demonstrating that the settlement distribution in fair, reasonable, and adequate. *Grunin vs. International House of Pancakes*, 513 F. 2d 114, 123 (8th Cir.) cert. denied 423 U.S. 864, 965 Ct. 124, 46 L.Ed. 2d 93 (1975).

The *Holmes* case also notes that when a settlement explicitly provides for preferential treatment for the named plaintiffs in a class action, a substantial burden falls upon the proponents of the settlement to demonstrate and document its fairness. The Court of Appeals noted the similarity to Pettway IV 576 F. 2d at 1217 where the court ruled on a prior dispute in the allocation of a settlement fund. "The court should not allow a majority, no matter how large, to impose its decision on the minority . . . Objection by a few dissatisfied class members should trigger close judicial scrutiny to ensure that the burden of settlement is not shifted arbitrarily to a small group of class members." *Plummer vs. Chemical Bank*, 668 F. 2d 654 (2nd Cir. 1982) states that "such disparities must be regarded as prima facie evidence that the settlement is unfair to the class, and a heavy burden falls on those who seek approval of such a settlement."

The proponents of the settlement in this case have clearly failed to carry their heavy burden to overcome objectors *prima facie* case. There was simply no evidence offered at the hearing in support of the settlement. The only evidence offered in support of the settlement were affidavits of Plaintiff's attorney Robert

Wiggins, Jr. et al. explaining reasons why in his opinion the settlement was fair, just, and reasonable and explaining his expert's calculations (F.H. 5, 6) and affidavits of the proposed experts of the defendants. Plaintiff's objectors properly objected to this injection of hearsay testimony. The district court's continuing failure to rule on this objection and failure to admit the same gave no basis for its use and was error sufficient for reversal, and should have in fact resulted in reversal. With no ruling whatsoever, objectors were denied due process in that they had no way of knowing what evidence was being considered in support of the settlement, and were denied the opportunity to intelligently contest such evidence in the best possible manner i.e. by cross examination that is by confronting the witness and discovering the basis of their opinion.

In *Holmes vs. Continental Can Co.*, at 1148 the Court of Appeals, 11th Circuit, notes that they limit their inquiry to the record of the fairness hearing. Any advocate or party relying on this standard of review would expect substantial evidence to be produced at such a hearing. As in *Pettway IV*, the fundamental problem facing us in our task today is the absence of an adequately developed factual record "576 F. 2d at 1183. *Holmes vs. Continental Can. Co.*, at 1150. The fact that numerous materials were considered in judges's chambers both before and after the hearing does not provide an adequate record for review. Such procedure heightens the impression that the fairness hearing is a mere rubber stamping used to ram a settlement down the throats of unwilling objectors., *Holmes vs. Continental Can. Co.* 706 at 1150.

Even if the affidavits were in the mind of the court entered in the open court in the fairness hearing, since these were the only evidence offered by proponents, reversal should follow. "Findings and conclusions should be made with respect to every controverted settlement. Moreover, those findings and conclusions should not be based simply on the arguments and recommendations of counsel," *Plummer vs. Chemical Bank*, 668 F. 2d 654, 659 (2nd Cir. 1982) quoting *Pettway IV*, 576 F. 2d at 1169. Further "when the district court approves a settlement which is not based upon well reasoned conclusions arrived at

after a comprehensive consideration of all relevant factors" its decision will not survive appellate review." Under its prior analysis in *Pettway IV*, the court should not have allowed this decision to survive appellate review.

As the *Plummer* case again quotes *Pettway IV* 576 at 1169, "The interest and of lawyer and class may diverge, as *may the interests of different class members* and certain interests may be wrongfully compromised, betrayed, and *sold out* without drawing the attention of the court." Such a sell-out is signalled here where there is simply no evidentiary foundation in support of the proposed settlement, except the erroneous reliance on counsel's opinion. Reliance on counsel's opinion tends to render the district court captive to the attorney and fosters rubber stamping by the court rather than the careful scrutiny which is essential for judicial approval. Even though statistics are competent evidence, they should not be so when they are "incomplete data." *United States vs. City of Miami, Fla.*, 614 F. 2d 1322 at 1352.

Certainly we did not expect the district judge to convert the fairness hearing into a full-blown trial on the merits. However, class action settlements should accept affidavits as evidence only after careful scrutiny. There was no such careful scrutiny in the case before us. At any rate, the affidavits were never properly introduced, and cannot be considered as evidence. Nor should the objectors have been under any burden to cross examine a witness, such as attorney for plaintiffs-appellee when he had not made a *prima facie* case by offering any testimony whatsoever. The apparent justification of the *attorney and the committee* for withholding all information whatsoever from the rest of the plaintiff class, supposedly a danger that such information would aid the defense is not in accord with our rules of discovery. A failure to satisfy the requirement that the representative parties fairly and adequately protect the interests of the class "produces a defect of constitutional dimension, which makes the judgment vulnerable to be reopened on a collateral attack." *Gonzalez vs. Cassidy*, 474 F. 2d 67 (5th Cir. 1973); in re *Four Seasons Sec. Law Litigation*, 502 F. 2d 834 (10th Cir. 1974).

The proposed consent decree, notice and the fairness hearing were all deficient to such an extent that the cumulative effect was to deny due process of law to the objectors.

Many deficiencies of due process may be bent, compromised or narrowed, but the attorney for a party should ethically and professionally represent only the interest of his client or clients. This principal is true without citation or authority or our adversary system has failed. The counsel for the parties should not have engaged in conduct that might even take on the appearance of collusion. The district court had been forewarned by the appeals, *Pettway IV* 576 Fed. 2d 1157, 1169.

The interest of lawyer and class may diverge, as may the interests of different class members and certain interests may be wrongfully compromised, betrayed or sold out without drawing the attention of the court," *Pettway* 576 F. 2d 1157, 1169.

For the numerous breaches noted herein the courts writ of certiorari should issue to grant due process to petitioners, reconcile the conflicts in the various circuits and to insure that the mandates of the appellate courts be accorded deference when the matters are implemented in the district court.

The writ of certiorari should be issued in this case for the reasons that an important question of federal law which has not been, but should be, settled by the court and the split in the circuits which is pronounced when the same case receives different treatment on a change in the circuits. The failure by the district court to follow the mandate of the Circuit Court of Appeals and the Eleventh Circuit's failure to enforce the "opt out" provision and implement the opting in of the 399 who cashed their checks had mandated and even reiterated in *Pettway III* and *Pettway IV* the "opt out" opportunity to be provided noting the conflict and dissatisfaction that might arise in the attempt to settle the case. The Eleventh Circuit, by quoting this as authority in *Holmes v. Continental Can Company* (supra) adopted the Fifth Circuit holdings as to opting out and due process for individual claimants in the class.

The conflicts of interest and the divided cohesiveness of the class qua the counsel so permeated the proceedings that the requirements of due process for adjudication taken in the name of the 399 previously identified and those objecting to the procedures and adequacy of the settlement were substantially breached. *Phillip v. Klassan*, 1974, 502 Fed.2d 362, 163 U.S. App. D.C. 360 cert. denied 95 S.Ct. 309; *Nguzen v. Kissinger*, 70 F.R.D. 656 (D.C. Cal. 1976); app. dismissed, 602 Fed.2d 925.

This court in *Gen. Tele. Co. of Southwest v. Falcon*, 457 U.S. 147, 72 L.Ed.2d. 740, 1025 S.Ct. 2364:

We have repeatedly held that "a class representative must be part of the class and *possess the same interest* and suffer the same injury as the class members" *East Texas Motor Freight System Inc. v. Rodriguez*, 431 U.S. 395, 52 L.Ed.2d. 453, 97 S.Ct. (1894) . . . (emphasis added).

The class representative and defendant thwarted "the same interest" of the class when they failed to hold the "opt in" procedure suggested by the court of appeals in *Pettway V. American Cast Iron Pipe Company*, 576 Fed.2d 1159 (1978 5th Cir.) pg. 1220, i.3. that is the court set up a procedure for the 399 who cashed their checks to return the monies received or post security for the same. While the court has supported a broad reading of Rule 23 "they do not justify the jettionsing of the cardinal principal that a class representative may not head a class whose interest substantially conflicts with his or her own. *East Texas Motor Freight, Inc. v. Rodriguez*" (supra).

The testing for the adequacy of representation was aptly summed up as to F.R. Civ. P. 23(a) (4) in *Twyman v. Rockville Housing Authority*, 99 F.R.D., 314 (1983):

*Because absent members of the class would be conclusively bound by results obtained by representatives and their attorney due process requires they be more than proforma representative. c.f. Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed.2nd 22 (1940) (emphasis added).

Mr. Wiggins, the class attorney, had the competency to recognize the problems as to the conflicts within the class as he had been lead counsel in the Pettway cases since 1975 and obtained the "opt out" rights and "opt in" procedure in Pettway IV.

The lower court was not without guidance for as herein Pettway III (*supra*) gave explicit instructions and the Fifth Circuit again in Pettway IV advised the lower court that an "opt out" right should be provided for persons dissatisfied with their entitlement and the other 399 who cashed checks be allowed to come back in as full members of the class not as second class claimants. Surely it could not be argued that under Rule 23 the district court can't require inclusion of an opt out right as noted in *Holmes vs. Continental Can Co.* (*supra*) but the Fifth Circuit Court of Appeals did not possess the power exercised in Pettway III and Pettway IV.

These clear instructions were not lost or forgotten but were cited with approval by the *Eleventh Circuit in Holmes vs. Continental Can* 706 Fed. 2nd, 1154 (1983) and the irony of the situation is that *Mr. Robert Wiggins, attorney for the class* obtained a reversal of a *consent decree* for failure to include an "opt out" right for individuals when *he at the same time was co-author of this settlement where the 5th Circuit had mandated an opt out provision*. This does not speak of equal protection or for representation, but cries out for redress to fulfill the promises of those who labored since 1966 to correct the "scourge of discrimination."

The decision by the Eleventh Circuit Court of Appeals in this petition has the unique distinction of being a case wherein there exists a conflict with the decision of the Fifth Circuit Court of Appeals in *the same case* and on the identical *proposition of law*, ie. the Fifth Circuit Court of Appeals mandated that a procedure for persons dissatisfied with any future settlement be established allowing them to opt out and pursue their claim in the same suit, *Pettway vs. American Cast Iron Pipe Co.* 576 Fed. 2nd, 1157 (5th Cir., 1978); cert. denied 439 U.S. 115 (1979).

Rule 23 envisions the court making orders to effectuate the purpose of the rule in line with the "opt out" right urged herein "Rule 23 . . . In the conduct of actions to which this rule applies *the court* may make appropriate orders . . . (2) requiring for the protection of the members of the class or otherwise for the fair conduct of the action . . . or of the opportunity of members to

signify whether they consider the representation fair and adequate . . ." This accords with the courts of the various circuits noting this method of requiring an opt out in b(2) class actions.

The defendant, American Cast Iron Pipe Company, has a pending petition for certiorari being Supreme Court case number 82-1074 and therein is urged that the court's proposal of hearing individual claims by a special master was proper and relied on language from this court out of *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) and sought to place the burden of proof on each individual his entitlement to an award. The defendant would impose on the individual the burden of going forward to prove his entitlement but does not even accord him due process by way of dedicated legal counsel in so complicated a case. Teamster (supra) can not stand for this proposition for our court surely would not impose so great a burden without a corresponding guarantee of due process.

Therefore petitioners are unable to see that any distinction can be found to justify the split of the circuits in the case within the case, Pettway III; Pettway IV; and Pettway VI (the instant case).

The writ of certiorari should be issued in this case for the reasons that an important question of federal law exists which has not been, but should be, settled by this Court and the split in the circuits on this issue causes different results on identical facts depending on where the cause of action arises.

## ISSUE II

*Whether "opting out" of a 23 (b) (2) civil rights class action is permissible and in certain occasions mandatory where class members are denied substantive due process with the Circuit Courts of Appeals being divided on this issue which has not but should be settled by this court.*

The United States Supreme Court has not decided the question of the right of a b(2) class member to opt out of the class and the permissibility of opting out. The several circuits have split on the issue and the necessary usage of class action under Rule 23, Federal Rules of Civil Procedure, to dispose of multiple claims and defenses mandates the court define the parameters of

conserving the courts' and parties' energies and expenses with the deprivation of class members due process rights to a point that the "fairness hearings" become patently unfair.

The Eleventh Circuit in *Holmes vs. Continental Can*, 706 Fed. 2d, 1144 (1983), Judge Vance noted:

(11) The United States Supreme Court has not yet decided whether opting out of (b) (2) classes is ever permissible, and the circuit courts of appeals are split on the issue. Compare *Plummer v. Chemical Bank*, 668 F.2d at 657; *Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1299 (9th Cir. 1981); *Laskey v. International Union, United Automotive; Aerospace & Agricultural Implement Workers*, 638 F.2d 954, 956 (6th Cir. 1981); *Penson v. Terminal Transport Co.*, 634 F.2d 989, 993 (5th Cir. 1981); *Bauman v. United States District Court*, 557 F.2d 650, 659-60 (9th Cir. 1977). Cases examining the right to opt out of Title VII class actions brought under subsection (b) (2) reflect a tension between the policy of facilitating antidiscrimination class actions and the need to protect the rights of absent class members. The general rule in this circuit remains that absent members of (b) (2) classes have no automatic right to opt out of the lawsuit and to prosecute an entirely separate action. See *Penson*, 634 F.2d at 993; *Grigsby v. North Mississippi Medical Center, Inc.* 586 F.2d 457, 461 (5th Cir. 1978); *LaChappelle v. Owens-Illinois*, 513 F.2d 286, 288 n. 7 (5th Cir. 1975); *United States v. United States Steel Corp.*, 520 F.2d 1043, 1957 (5th Cir. 1975), cert. denied 429 U.S. 817, 97 S. Ct. 61, 50 L.Ed.2d 77 (1977).

The abuse engendered by the attempts of the several circuits to balance the rights of individuals with due process and fairness has been the subject of serious inquiry:

(1) *n Wetzel [v. Liberty Mut. Ins. Co., 508 F.2d 239 (3d Cir. 1975)]*, the court in part justified its refusal to require notice for absent members by pointing to the need to effectuate the policies of Title VII: "Suits brought by private employees are the cutting edge of the Title VII

sword which Congress has fashioned to fight a major enemy to continuing progress, strength, and solidarity in our nation, discrimination in employment . . . The imposition of notice and the ensuing costs often discourage such suits."

This passage epitomizes the dilemma spawned by the growth of Title VII back pay class actions. Courts are mindful of the fact that traditional (b)(2) certification policies deprive absent members of due process consideration, but justify it in the name of the "overriding" public policy objectives of Title VII and continue to classify heterogeneous (sic) classes under (b)(2) rather than (b)(3).

The irony here, of course, is that while granting the class great deference on the substantive and policy issues in a suit, courts deny many members of the class procedural fairness.

Rosen, Title VII Classes and Due Process; To (b)(2) or Not To (b)(3), 26 Wayne L. Rev. 919, 952 (1980) }  
(footnote omitted).

The courts in the earlier Pettway cases in justifying its previous orders in Pettway III and IV to include a right to "opt out" in the event a member of the class disagreed as to his entitlement on a settlement in the future reasoned that although the action was initiated as a Rule 23(b)2 in the back pay aspect it "begins to resemble a 23(b)3 action" *Pettway vs. American Cast Iron Pipe Company* (Pettway III), 411 Fed 2nd, 908 (5th Cir.) *Pettway vs. American Cast Iron Pipe Company* (Pettway IV), 576 Fed 2nd, 1157 (1978). *Penson vs. Terminal Transport Company*, 634 Fed 2nd 994 (5th Cir.)

The ninth (9th) Circuit Court of Appeals has arrived at a similar holding in allowing an opt out of a 23 (b)2 class action reasoning that "given the breadth and nature of the claims asserted the class allegations in the plaintiff's complaint and the procedures adopted by the district court it appears clear that this case was in essence a Rule (23)(b)(3) class action." *Officers for*

*Justice vs. Civil Service Commission*, 688 Fed 2d 615, 634-635 (9th Circuit 1982)

In trying to provide due process rights for individual members several circuits have allowed an "opt out" procedure justifying this under the "discretion of the court" as set forth in *Holmes vs. Continental Can Company*, 1154, (supra).

This is not to suggest, however, that opt out procedures have no applicability to the (b) (2) class action. Parties to a proposed class action settlement may themselves provide for an opt out procedure by which class members may exclude themselves from the class and litigate their claims in the same action or in a separate lawsuit, see, e.g., *Parker v. Anderson*, 667 F.2d 1204, 1208 (5th Cir.), cert. denied—U.S.—, 103 S.Ct. 63, 74 L.Ed.2d 65 (1982); *Penson*, 634 F2d at 995; *Cotton*, 449 F2d at 1333; *West Virginia v. Chas. Pfizer Co.*, 440 F. 2d 1079, 1982 (2d Cir.), aff'd by an equally divided Court, 404 U.S. 548, 92 S.Ct. 731, 30 L. Ed.2d 721 (1971), and in appropriate cases a court may conclude that a proposed settlement should be disapproved unless the parties agree to such a procedure. In *Penson v. Terminal Transport Co.*, the former fifth circuit held that "although a member of a class certified under Rule 23(b)(2) has no absolute right to opt out of the class, a district court may mandate such a right pursuant to its discretionary power under Rule 23." 634 F.2d at 993. This holding followed from *Pettway III*, where the court reasoned that Title VII claimants "dissatisfied with their portion of the (back pay) award should be allowed to opt out in order to prove that they were entitled to a larger portion." 494 F.2d at 263 n. 154. On remand the district judge entered a final order providing "a mechanism for subclass members to opt in or out of the settlement." 576 F.2d at 1166 n. 2. When the case once again came before the former fifth circuit, Judge Goldberg in *Pettway IV* stated that the court had "recently commented that opting out of the lawsuit altogether after a back pay award settlement is not permitted in 23(b)(2) class actions." *Id.* at 1220. Judge

Goldberg read footnote 154 in Pettway III to require that "dissatisfied claimants be given an opportunity to prove entitlement to a larger individual award in the same lawsuit."

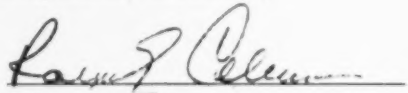
It is of interest here that the majority here are the individuals who objected to the \$1,000,000 settlement in 1975 and that there is a reversal in roles. The Court of Appeals, 5th Circuit had mandated and even reiterated in Pettway III and IV the opt out opportunity to be provided noting the conflicts and dissatisfaction that might arise in the attempt to settle the case. The 11th Circuit by quoting this as authority in *Holmes vs. Continental Can Company* (supra) adopted the 5th Circuit holdings as to opting out and due process for individual claimants in the class.

Therefore, petitioners are unable to see that any distinction can be found to justify the split of the circuits in the case within the case, Pettway III; Pettway IV; and Pettway VI (the instant case).

### CONCLUSION

In view of the foregoing, this Court's Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, reverse the judgments of the Court of Appeals and the District Court entering such orders as necessary to effectuate the holdings in Pettway III and Pettway IV and to assure adequate representation of all members of the class.

Respectfully submitted,



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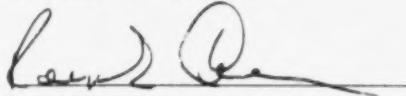
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**PROOF OF SERVICE**

I, Ralph E. Coleman, a member of the Bar of this Court as counsel of record for petitioners here, Charles L. Daniel, et al, hereby certify that three copies of the above and foregoing Petition for Writ of Certiorari, together with appendices thereto, have been served by United States mail, postage prepaid and properly addressed upon Robert L. Wiggins, Jr., Attorney at Law, Suite 716 Brown-Marx Building, 2000 1st Avenue North, Birmingham, Alabama 35203, Ms. Marcia B. Ruskin, Office of General Counsel Equal Employment Opportunity Commission, 2401 E. Street, Washington, D.C. 20506, and J. Fredric Ingram, Attorney at Law, 1600 Bank for Savings Building, Birmingham, Alabama 35203 on this the 30th Day of April, 1984.

A handwritten signature in black ink, appearing to read 'Ralph E. Coleman', written over a horizontal line.

Ralph E. Coleman